

## **Policy capacity and legal capacity: missing links at the individual, organizational and systemic level?**

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### **Abstract**

The paper addresses the first research question of the IPPA Workshop on Policy capacity: “how is this current definition of policy capacity conceptually similar to other notions of capacity?” The paper argues that legal capacity is to a large extent ignored in policy capacity studies. The few of the subdimensions of legal capacity that are addressed are uneasily boxed in under operational and political systemic capacity. This paper suggest to add a legal dimension to the accepted policy capacity matrix and attempts to conceptually disentangle legal resources and capabilities at the individual, organizational, and systemic level. This is a first step for making legal capacity observable and for discussing when and how legal capabilities are related to analytical, managerial and political capacity, as well as to overall policy capacity.

### **Introduction**

The policy capacity matrix model of Wu, Ramesh and Howlett (2018) is an enlightening scheme for disentangling various dimensions of policy capacity. For the authors, policy capacity is in essence a function of three competences or skills that constitute the ability of governments to make, implement and evaluate policies, as well as to learn and adapt. The three competences rely on the mobilization of resources at the individual, organizational,

and system level. The authors distinguish between analytical, operational (or managerial), and political skills and competences. Analytical skills are deployed for problem diagnostics, solution finding, and policy evaluation. Operational skills mobilize material and organizational resources to implement policies in practice. Political skills enable policy actors to mobilize resources for garnering and maintaining support for policies and their implementation (Wu et al. 2018: 5). To these three set of competences, this paper adds legal skills and competencies as a fourth category to redress the relative neglect of lawmaking skills, legal counsel and advice, legal procedures and adjudication in policy capacity studies. The starting point of the paper is that legal skills and competencies are crucial for policy capacity in that they are necessary to transpose policies in law and regulations, ensure due process, enforce compliance and control, and protect citizens from policies' harm.

The paper hence addresses the first research question of the IPPA Workshop on Policy capacity: "how is this current definition of policy capacity conceptually similar to other notions of capacity?" The paper argues that legal capacity is to a large extent ignored in policy capacity studies. The few of the subdimensions of legal capacity that are addressed are uneasily boxed in under operational systemic capacity (see also Hartley and Zhang 2018: 72).

To conceptually integrate legal capacity with policy capacity the paper starts from the option to add legal skills and capabilities as a fourth column to the matrix model. At the individual level of capabilities, lawyers in government are, in comparison to civil servants and politicians, much neglected in policy capacity studies, particularly when it comes to their contributions to policy-design. Available research, however, shows how important legal expertise and skills are in bill writing and the transposition of policy intentions in regulations (Page, 2011, 2012). At the level of organizational capabilities of government, research on the role of legal counsel functions, regulatory quality control, and legal support units in government is emergent in public administration and public policy scholarship (Damonte et al. 2017; Mastebroek 2017; Van De Walle and Brans 2017), but not explicitly addressed in the policy capacity matrix. Neither can, at the systemic level, the rule of law, relationships with administrative courts, as well as cultures of compliance be given adequate attention in the present matrix. This paper attempts to conceptually disentangle legal resources and

capabilities. This is a first step for making them observable and for discussing when and how legal capabilities are related to analytical, managerial and political capacity, as well as to overall policy capacity.

The paper is structured as follows. Section one argues why legal capacity merits a place in the policy capacity matrix. Section two presents the bulk of the paper. It attempts to define legal capabilities and resources at the individual, organizational, and systemic level. The conclusion summarizes these dimensions of legal capacity, as well as their contributions to policy functions that sustain overall policy capacity, and the benefits and risks associated with high and low legal capacity respectively. It explores the relation with other analytical, managerial and operational capacity dimensions. Finally, the conclusion suggests some avenues for making the different components of legal capacity observable.

## 1 Introducing legal capacity into the policy capacity matrix.

### 1.1 The Policy Capacity Matrix

According to Wu, Howlett and Ramesh (2018) policy capacity is defined as the set of skills and resources – or competences and capabilities- necessary to perform policy functions. Skills or competences are categorized into three types: analytical, operational and political. Each of these three competences involve resources or capabilities at three different levels: individual, organizational and systemic. On the basis of these building block, the authors constructed a matrix that offers a multi-dimensional perspective on policy and governance capacity, which ultimately can improve the understanding of the occurrence of policy successes and failures.

Levels of Resources and Capabilities	Skills and Competences		
	Analytical	Operational	Political
Individual	Individual Analytical Capacity	Individual Operational Capacity	Individual Political Capacity
Organizational	Organizational Analytical Capacity	Organizational Operational Capacity	Organizational Political Capacity
Systemic	Systemic Analytical Capacity	Systemic Operational Capacity	Systemic Political Capacity

Table 1: Policy capacity matrix according to Wu, Howlett and Ramesh (2018)

Policy successes demand high levels of capacities in multiple dimensions – analytical, operational and political. High levels can be hypothesized to be positively related to achieving outputs and outcomes that are intended and broadly supported or at least not opposed to. Low levels of capacity would lead to suboptimal outputs and outcomes, and policy obstruction.

### *1.2. Why legal capacity merits a place in the matrix?*

The matrix as constructed by Wu, Howlett and Ramesh (2018), is an excellent starting point. We would like to keep it as a basis but believe there are good reasons to expand it with a consideration of legal capacity. Government policy always materializes within a legal order and often makes use of instruments of law to achieve its objectives. Legal capacity pertains to capabilities and resources to incorporate opportunities and constraints of the legal system in the policy-making process as well as to ensure coherence of the legal system. Insufficient legal capacity explains instances of policy failures, ranging from implementation deficits to policy annulment or legally imposed policy termination.

Legal capacity has unique features, which make it difficult to include it into the categories of analytical, operational or political capacity. Legal capacity has a strong analytical dimension, but this operates only within the boundaries of what law recognizes as valid claims. More importantly, law has a particular function in the policy-making process, namely it is normative in nature. Such normative function is only possible by recognizing the authority of legal norms, and the latter is built up through the role of actors with particular legal skills and via a system of institutions with recognized legal authority. This legal capacity is institutionalized throughout the entire policy-making process. Without this capacity, analytical, organizational and political capacity would not deliver much more than a talking shop. Legal capacity is an indispensable fourth category needed to deliver policy capacity.

The starting point is that modern governments function with a system of law, irrespective of what the nature is of that law. Traditionally, one would define law as the system of legal rules and principles that are recognized and sanctioned by courts. Law is broader than rule-making that is decided by a formal legislator or administrative agencies. Law is equally constituted by other than formal legislators who call into life material legal rules, or by generally binding principles of law. In addition, there are general legal principles that are

recognized in jurisprudence and derived from the legal system. Moreover, soft law pushes the boundaries of law; documents such as administrative guidance and communications cannot directly be sanctioned in court, but steer nevertheless behavior, can be scrutinized by non-judicial means as ombudsmen, or can even be used in courts as interpretative tools for binding instruments.

While we favor such a broad definition of law, our conceptualization of legal capacity is not aimed at measuring the efficiency of the entire legal system. Our focus is primarily on the regulatory dimension of law. The jurisprudential dimension of law is also important but only to the extent that courts impact on the review and feedback of regulation.

This focus on regulation as a process through which regulations carry out the intent of policies is useful in connecting law to the policy process and legal capacity to policy capacity. It is through regulation that policies guide the activities designed to address social, environmental, and economic problems. It is through regulation that policies shape the behavior of both those who regulate and those who are regulated. As products, regulations come in many forms of rules, and range from laws and statutes to delegated legislation , over decisions of regulatory bodies to interpretative bulletins. (Keyes 1996, Cited on <https://www.policydesignlab.com/>)

Law as used it here pertains to a process of regulation regardless of the part of law to which it formally belongs. It hence comprises all jurisdictions within which law functions, whether these jurisdictions are national or international. The regulation process is moreover supposed to proceed in a sequential way: 1) primary rule-making or legislation, 2) secondary rule-making or delegated rule-making 2) enforcement, 3) review. In each stage, specific actors and relevant subdomains of law play a more or less prominent role. These actors and relevant subdomains are presented in the table underneath.

Table 2: overview of the regulation process stages: actors, relevant law, and corresponding policy-making stages

STAGE ONE: LEGISLATIVE RULEMAKING	STAGE TWO: DELEGATED RULE- MAKING AND RULE- MAKING BY EXECUTIVE BODIES	STAGE THREE: ENFORCEMENT	STAGE FOUR: JUDICIAL REVIEW
<p><b>Public Actors</b></p> <p>Legislator</p> <p>Administrative bodies and agencies</p> <p>Law committees</p> <p><b>Relevant law</b></p> <p>Constitutional law</p> <p>Administrative law</p> <p>Public international law</p> <p>European Law</p>	<p><b>Public Actors</b></p> <p>Administrative bodies and agencies</p> <p>Regulatory agencies</p> <p><b>Relevant law</b></p> <p>Administrative law</p> <p>Public international law</p> <p>European Law</p>	<p><b>Public actors</b></p> <p>Administrative bodies and agencies</p> <p>Courts (criminal prosecutions, class actions)</p> <p><b>Relevant law</b></p> <p>Administrative procedure</p> <p>Criminal procedure</p> <p>Civil procedure</p> <p>European Law</p>	<p><b>Public actors</b></p> <p>Courts</p> <p><b>Relevant law</b></p> <p>Constitutional law</p> <p>Administrative law</p> <p>Public international law</p> <p>European Law</p>
<p><b>Private actors</b></p> <p>Depends on policy sector</p> <p>Law firms</p> <p><b>Relevant law</b></p> <p>Corporate law</p> <p>Labor law</p> <p>Contract law</p> <p>Public law (on delegation)</p> <p>European Law</p>	<p><b>Private actors</b></p> <p>Depends on policy sector</p> <p>Interest group representatives</p> <p><b>Relevant law</b></p> <p>Corporate law</p> <p>Labor law</p> <p>Contract law</p> <p>Public law (on delegation)</p> <p>European law</p>	<p><b>Private actors</b></p> <p>Auditing firms</p> <p>Alternative dispute resolution tribunals</p> <p><b>Relevant Law</b></p> <p>Contract law</p> <p>Public law (on delegation and procedure)</p>	<p><b>Private actors</b></p> <p>Alternative dispute resolution tribunals</p> <p>International arbitral tribunals</p> <p><b>Relevant Law</b></p> <p>Public law (on delegation and procedure)</p>
POLICY FORMULATION AND DECISION STAGES	IMPLEMENTATION STAGE		EVALUATION AND FEEDBACK STAGES

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Legal capacity can be analysed within all political regimes. Even within non-democratic societies, legal capacity is required to ensure efficiency of policy and compliance. However, we focus our analysis on legal capacity within the context of a democratic *Rechtstaat*, in which legal capacity has not only a function in contributing to better policy output and compliance but equally in ensuring respect of general principles of democracy and rule of law.<sup>1</sup> Even though the importance of *Rechtstaat* is generally recognized, there are multiple perspectives of what exactly constitutes a *Rechtstaat*. The literature does seem to agree, however, on at least four characteristics these perspectives recognize. The first principle is legality. Legality means that a person or institution is legally competent only to the extent that this competence has been assigned to this person or institution. A second principle is the hierarchy of norms. The principle posits that lower norms of law should be in congruence with higher norms of law. This does, however, not mean, that breaches of what is called the hierarchy of legal norms can always and in similar ways be sanctioned. A third principle is the well-known concept of the separation of powers, meaning there are three distinct functions of power: legislative, executive, and judicial. The separation of power does not mean that the separate functions of power are executed by separate institutions or actors. In some countries, like Belgium and the Netherlands, one would rather refer to a balance of power, where there are mutual checks and balances. A vertical separation of powers, in turn, refers to a division of competences between different parts of the state at the national, regional, intermediate and local level. While this usually entails a hierarchy of legal norms, it also happens that legal norms are of equal value. The latter case calls for special mechanisms, specific rules and possibly specific institutions charged with resolving conflicts between legal norms. It is indeed increasingly difficult to sustain the idea of having exclusive competences, given the growing interconnectedness between different policy sectors at different levels. Finally, a *Rechtstaat* is maintained by a fourth principle, that is the recognition of fundamental rights of citizens, protecting them against the excessive use of government power. This refers to what is called the vertical function of fundamental rights. Yet the recognition of human rights also has a horizontal function. Some fundamental rights protect citizens against fellow citizens, companies, and organizations outside the public sector. The emergence of such fundamental rights increasingly force government to initiate

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<sup>1</sup> For convenience, the remainder of this paragraph uses the term 'Rechtstaat' even though the concept is generally associated with continental law traditions.

policies in response to protecting citizens' right to a healthy living environment or to design policies in a way that traditional fundamental and protective rights (such as freedom of speech and the right to privacy) can be effectively put to use.

It is through legal capacity that these features of the *Rechtstaat* can be realized. Analytical, organizational and political capacity on their own cannot provide this. While this normative position is generally more prominent in law studies than in policy sciences, it should not sit ill with the normative underpinning of policy capacity studies: to contribute to understanding policy successes and failures.

In this contribution we suggest to add a fourth column to the policy capacity matrix to compensate for the relative lack of attention for legal dimensions of policy capacity studies. So far, only few of what we believe are relevant subdimensions of legal capacity are addressed in the original matrix, and those that are addressed are uneasily boxed in under operational systemic capacity (see also Hartley and Zhang 2018: 72).

Table 3: expanded policy capacity matrix

Levels of Resources and Capabilities	Skills and Competences			
	Analytical	Operational	Political	Legal
Individual	Individual Analytical Capacity	Individual Operational Capacity	Individual Political Capacity	Individual Legal Capacity
Organizational	Organizational Analytical Capacity	Organizational Operational Capacity	Organizational Political Capacity	Organizational Legal Capacity
Systemic	Systemic Analytical Capacity	Systemic Operational Capacity	Systemic Political Capacity	Systemic Legal Capacity

In this contribution, we primarily focus on the legal capacity of government, but will consider external legal capacity of other actors, in so far as this holds influence over the legal capacity of government. The degree to which legal capacity is present within government cannot be fully understood without external legal capacity. In a governance perspective, external actors can put their legal capacity to the use of government actors. Yet, it may also

happen that external actors will use their legal capacity against government actors, to obstruct or render impossible the implementation of government policies and the achievement of government goals, even have policies annulled.

We argue that all policy functions are affected by the presence of legal capacity: from policy-formulation and decision-making, to implementation, evaluation, and feedback (termination, adaptation, maintenance). We try to identify what legal resources at the individual, organizational and systemic level are important for conceptualizing legal capacity, and what their importance is for sustaining policy functions, thus contributing to overall policy capacity.

## **2 Legal capacity at the individual, organizational and systemic level**

This part of our paper is an attempt at describing legal capacity at the individual, organisational and systemic level as a first step to operationalising these components and making them empirically observable.

### *2.1 Legal capacity at the individual level*

What a public organization does, can do, and the likelihood of its success, not only depends critically on the individual legal capacity of its employees to shape, implement and evaluate policies within a framework of law. Policy actions, opportunities and successes also depend on individual actors' capacity to deal with law in a creative way.

It would be misleading for legal capacity to focus merely on the legal profession in government. The presence of lawyers in bureaucratic organizations is in itself no guarantee for individual legal capacity as understood from a general policy capacity perspective. On the contrary, the predominance of lawyers in some bureaucracies has come to be seen as an impediment to effective problem solving, as large numbers of lawyers in the highest level of the bureaucracies had become suspect as advocates of the policy status quo, too inefficient and 'too dull' at handling new subjects and challenges (Curry et al. 2014. Canadian Government 1996: 29-32). Increasingly, since the last quarter of the 20<sup>th</sup> century, bureaucracies have promoted the recruitment of generalists and managerialists, with degrees other than law, such as economists and political science. Yet, a balanced representation of lawyers in the government apparatus is certainly necessary, for the

performance of certain legal functions, or for interactions with external legally capable stakeholders and courts.

Yet, what is more important for ensuring policy capacity is the presence of legal skills and knowledge of all individual employees engaged in one or the other stage of the policy process. As with individual analytical capacity, not all employees should possess legal skills to an equal degree. It would also be misconceived to have the presence of legal skills confined to higher levels in the administrative apparatus, however important this presence at the top may be. Drafting and interpreting legislation will indeed take place predominantly at the top of administration, but also at lower levels of the hierarchy legal skills are indispensable, particularly during the process of policy implementation, down to the street level bureaucrats (Lipsky 1980).

What is meant exactly with legal skills at the individual level? Individual legal skills on the one hand include the knowledge and the understanding of legal concepts, which entail a capacity of abstraction and linking abstract legal notions to concrete realities. It includes also the understanding of the conditions under which policies risk breaching fundamental rights. Policy designers have to know the degree of manoeuvrability of policies, given the legal checks and balances that fundamentally characterise democratic states. Depending on the policy domain they have to be knowledgeable about particular subdomains of law, and have a proper understanding of administrative law and case law.

On the other hand, legal skills include technical law and regulation drafting skills. These include the technical skills to use correct legal language in an accessible fashion.

The presence of legal skills at the individual level is determined by the way in which individual employees update their knowledge and understanding of legal concepts and their technical legal skills, by participating in training on the job. In some countries, each public service employee is expected to engage in training. This is different from the degree in which the organization itself contributes to strengthening legal capacity.

Legal skills are resources to sustain several policy functions. Because policies need to be for the greater part be transposed into law, legal capacity is needed when policies are transposed and translated in legal texts. Legal skills further sustain the quality of policy

formulation, including the consideration and evaluation of different policy options. More particularly, the quality of policy formulation is affected by legal information and understanding of legal principles, existing legislation and jurisprudence. A proper understanding of law and jurisprudence acknowledges the role of courts as powerful participants in the policy-making process (de Witte, Muir, & Dawson, 2013). The penalty for legal shortcomings of policies is high as it usually entails their annulment.

Legal capacity also sustains the quality of implementation. Given that many policies are written down in law, the lack of knowledge and understanding of legal principles and the applicable sections of law are necessary for achieving policy objectives. It is also well known that law tends to grant substantive discretionary autonomy to policy implementing agents. This discretion (Evans, 2010, 2011; Pletcher 1984) is often intentional since not all specific situations can be captured in legal rules. Next to being intended, such discretion is also desirable. Law is abstract and its power is strongest when it regulates behaviour in a general way. Yet the cases to which law applies are very diverse and the application of strict uniform rules would in many cases lead to unjust treatment. Should law be extended to include applicability to all individual cases, it would become too expansive and impossible to control. It is therefore typical to find many vague principles in law<sup>2</sup>.

Discretionary autonomy is not a free space, but is surrounded by legal principles that should be known and dealt with at all levels, from the top to the street level. The discretionary policy space requires legal skills for it to be used in congruence with the goals specified in legislation, with respect for general principles of law, and with fundamental rights. This can be illustrated with discretionary decisions on placing cctv cameras for raising security. The possibility to place such cameras in the vicinity of people's front door in the pursuit of more security should be weighed against the privacy expectations of subjects when they make use of public space. Such breaches of personal privacy require that the conditions under which these breaches are possible are respected, meaning that the breach is laid down in law, that it is necessary in a democratic society and that the grounds are related to the protection of legal properties.

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<sup>2</sup> Laws may also be vague to hide a lack of consensus on specific policy goals. The concrete content will then emerge from the concrete application and feedback thereon.

Having legal skills is also important for policy evaluation. Legislative evaluation or evaluation of legislation is part of policy evaluation. In this type of evaluation, one not only verifies whether the objectives of the relevant legislation are achieved, but also whether the bill is well written and does not engender interpretation problems. The knowledge of jurisprudence and ensuing problems for implementing legislation, contribute to evaluating policies as translated in legislation. Variations in jurisprudence can point at problematic imperfections of legislation. Take for instance the domain of spatial planning. Certain objectives of spatial planning policies cannot be achieved when certain components of the legislation in which these policies are anchored are of low legal quality, the imperfections of which can lead to endless procedures. A thorough understanding of jurisprudence when evaluating legislation is all the more important in countries with a continental law tradition. In continental legal systems, there is no such principle as the rule of precedence, meaning jurisprudence is case based. In Anglo-Saxon legal systems, or common law systems, in turn, each new court case follows the principle that similar cases should be dealt with according to consistent and principled rules, leading to a similar result<sup>3</sup>.

It is also important to know whether a public organization has sufficient in-house legal capacity, or whether it needs to take recourse to external legal capacity. External legal capacity can be acquired from another organization in government or from an organization outside government, for instance by contracting academics, law firms or other forms of consultancy. Relying on external legal capacity is not neutral. Other actors have their own frame of reference from which they can interpret and elaborate legislation. Legislation is not a neutral technical activity, and can fall victim to regulatory capture, lacking democratic accountability.

## *2.2 Legal capacity at the organizational level*

Turning to the organizational level, the legal infrastructure of government matters to policy capacity. Organisational legal capacity depends, among others, of commitments of the organisation, translated into apt structures and processes. These include recruitment programmes and incentives structures for training. Commitments can also consist of structural measures such as the creation of specific legal support units, and of efforts to

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<sup>3</sup> In Anglo-Saxon law countries, judicial authorities co-create rules rather than interpret them as they do in continental law traditions.

nurture a organizational culture that values knowledge and respect of law and legal principles.

The organizational commitment to legal capacity consists of efforts for keeping up to standards sufficient personnel with legal knowledge and skills and implies deliberate HRM programmes through which employees are selected as employees, and through which personnel are offered general and specific training. Another organizational resource is legal memory, and sufficient access to legal information sources, constituting a particular challenge for organizational learning.

Legal capacity at the organisational level is also related to processes within the organisation that devote particular attention to the legal aspects of policy formulation and policy implementation. Legal counsel can be garnered from within the organisation, but also outside. Take for instance the section Legislation of the State Council (in Belgium, the Netherlands and in France for example). This division assumes the role of providing ex ante legal counsel to the different governments. In the case of a federal state such as Belgium, in its ex ante form, this counsel pertains to draft bills of the federal government and parliament, decrees of the communities and regional executives and parliaments, or ordonnances of the Brussel Capital Region. The restriction of legal counsel to draft legislation excludes other legal texts from this kind of scrutiny, hence leading to lesser guarantees of legal quality of regulations of local governments and or autonomous agencies. Legal counsel ex post of legislation is possible through evaluations by such institutions as Court of Auditors, when policy programmes and measures are reviewed against the criterion of legality, next to the criteria of efficiency and effectiveness and of trade-offs between these values. As to the regulation of lower levels of government or autonomous government agencies, ex post tutelage provides some legal checks, but in several countries the scope of tutelage is shrinking in view of principles of subsidiarity and autonomy.

Other components of organizational legal capacity are legal feedback mechanism of a compulsory or voluntary nature. Next to compulsory legal counsel as provided by the Division of Legislation of such bodies at the Council of State, there are other advisory bodies of note, taking up a legal role of one kind or another. In some countries, all new legislation requires advice by strategic advisory bodies, hence legally entrenching the involvement of

external representative stakeholders. Other examples include committees for the protection of privacy, a role that has gained in prevalence in Europe in compliance with the General Data Protection Regulation and will be further institutionalized in Data Protection Authorities. Some specialized committees offer advice, either solicited or voluntary. This is for instance the case with Committees for the access to and re-use of government documents or appeal committees for access to environmental information. Having these feedback mechanisms is important at the organizational capacity level. At an aggregate level they can contribute to a legal feedback culture, implying an openness to deal with and learn from legal feedback, thus constituting legal capacity at the systemic level.

Government organisations can also strengthen legal capacity by making use of procedural regulatory instruments (Damonte et al. 2017) such as green- and white papers, regulatory impact assessments, internal instructions for enhancing the quality of legislation, the use of a legislation agenda, as well as of units that scrutinize compliance. The latter control mechanisms also imply that jurisprudence and legal doctrine are carefully monitored and followed up when needed, by issuing additional instructions for implementation, or even by an adaptation of rules. The combined use of Green and White papers and a legislation agenda allows for including societal input whilst at the same time providing enough time for involving different stakeholders for enhancing the feasibility of legislation.

Legal capacity at the organisational level supports several policy functions such as formulation, and ex ante and ex post evaluations. It contributes to the quality of regulation by assessing and evaluating the legal consequences of regulation. It allows to rule out certain policy options on legal grounds by relying on repositories of knowledge of the legal system and jurisprudence. Legal capacity within an organisation allows for regulatory reflexivity and enables choices for other policy instruments when regulatory policy instruments are expected to be inefficient and ineffective. It may occur for instance that issuing regulation puts too heavy demands on realizing compliance and organising control and sanctioning procedures. Legal capacity ex post support policy evaluation and feedback when juridical review and evaluation contribute to the protection of the rights of individuals, companies and other organisations.

Organisational legal capacity is crucial for policy implementation and the organisation of due process throughout chains of implementation. It can also help to prevent time delays in implementation. In the domain of complex infrastructural policies, for instance legal capacity can support smart procedures that allow for combining in one integrated process the necessary attribution of land use, the issuing of necessary building permits, and the organisation of citizen appeals (see for instance Flemish Complex Projects' Decree 25 April 2014 (BS 27 08 2014)).

Internal organisational legal capacity should be in balance with external organizational legal capacity, particularly when considering that external legal capacity can be used to sabotage government policy.

### *2.3 Legal capacity at the systemic level*

Legal capacity at the systemic level is constituted by the rule of law, legal coherence, and legal feedback from society.

Firstly, the presence and realisation of the rule of law is crucial for overall policy capacity. Its translation into institutions, principles, procedures and specific rules contribute to the degree in which competences and the execution of policies' power over subjects prevent abuses of power. Yet the more concrete the rule of law is translated into practical procedures and rules, the more diverse its manifestation becomes. The rule of law is generally expressed in a number of legal principles, the number and understanding of which can diverge. This divergence increases with the degree to which the rule of law is expressed in institutions, rules and actual jurisprudence (WRR 2002). This engenders different national conceptions of the rule of law (Gosaldo-Bono 2010). The rule of law has moreover become very complex with emergent principles conflicting with existing ones. Conflicts between the principle of transparency and the principle of secrecy are cases in point (Van Klink, B. 2005).

Secondly, at the systemic level, the coherence of the legal system matters for overall policy capacity. Legal capacity may be unequally spread across different policy domains. Absence of sufficient legal capacity in some policy domains or subsectors can affect overall legal capacity by engendering contradicting rules and jurisprudence. The translation of policies

into laws with uneven quality undermine the quality of the legal system as whole, and make policy domains unevenly vulnerable to negative consequences from external legal powers.

Coherence also consists of the capacity to deal with intersectoral legal conflicts. Systemic legal capacity thus requires mechanisms to prevent or adjudicate such conflicts. Particularly in federal states, but also in other states, the presence of a Constitutional Court is important in this respect.

The legal system is a subsystem within which policies are formulated, decided, implemented, sanctioned, evaluated and revised. This system differs across nations. At the same time, it is no longer monolayered. Current legal orders are no longer monolevel but multilevel and consists of national, regional and international legal norms and jurisprudence by a diverse range of colleges of law (Von der Pfordten 2014). At the system level, legal capacity is furthered by the fit between national legal systems and supranational and international legal regimes, and the coherence of rules on vertical delegation/division of roles between different territorial levels.

Thirdly, systematic legal capacity is positively affected by the presence of legal means that provide citizens access to documents, such a freedom of information legislation, or legal mechanisms that enforce accountability. These legal tools support legal feedback from society, which not only matter for organisational capacity but also foster the diffusion of knowledge of cases to which legal norms apply and hence also provide resources for other dimensions of policy capacity.

Systemic legal capacity matters substantively to the (in)effectiveness of aggregate legislation and regulations for the resolution of policy problems. In many states, the number and low quality of legal acts has raised concerns about regulatory inflation or overregulation and negative regulatory impacts of caconomy through scattered laws (European Commission 2018; OECD Better Regulation), potentially leading to policy stalemate policies, delays in administering justice, and even budgetary costs (OECD, 2014; Sotiropoulos & Christopoulos, 2017 quoted in Skartoulis, S. 2018: 33 ). When countries moreover do little to organise and codify existing legislation, existing laws will contradict each other, and multiple laws will regulate one particular situation, “leading to confusion and misinformation among not only

citizens, but even among specialized individuals (Skartoulis 2018: 33)” in both the public and private sectors.

## **Conclusion**

In this paper we have argued that that legal capacity matters for overall policy capacity. These arguments are summarized in table 4, with an overview of the policy functions to which different dimensions at different levels contribute to policy functions, and with a tentative consideration of the benefits and risks of high and low levels of legal capacity.

Yet, if and where legal capacity merits a place in the policy capacity matrix, is a point of debate. To deal with the relative neglect of legal capacity dimensions in the accepted policy capacity matrix, we have added legal capacity as a separate fourth column or row, (depending on the matrix presentation). The case to insert these dimensions as subcomponents under the accepted analytical, managerial and political categories, is a case still to be made. To be sure, a few of the legal capacity dimensions are already present, as the rule of law and access to information are boxed in under managerial system capacity and political system capacity (see the grey cells of overlap in table 5). It is clear though that legal intelligence and legal organizational capacity have hitherto remained out of the heuristic scope of the matrix. Hartley and Zang (2018: 84) too (foot)noted the absence of regulatory quality in the accepted matrix, while their review of the match between governance indices and the matrix revealed widespread attention for regulatory quality and regulatory burdens, next to rule of law, and access to information.

At any rate, if, as Wu et al. (2018: 1) state, the matrix’ aim is to “exercise more precision” in “the assessment of policy capacity to make good policy choices and implement them effectively”, legal capacity dimensions deserve more attention than they presently get. Hartley and Zang’s (2018) overview of governance indices (GIPI, SGI, WGI, BTI) is promising as to making some of these dimensions observable and comparable.

Yet, more interdisciplinary research exchange is needed for incorporating empirical insights from comparative public administration and law to fully capture empirical manifestations of legal intelligence, legal organizational capacity and legal system capacity, as well as their interplay with other capacity dimensions.

Table 4 Summary table: legal capacity, policy functions, capacity gains and risks

<b>LEGAL CAPACITY</b>	<b>SKILLS AND RESOURCES</b>	<b>POLICY FUNCTIONS</b>	<b>HIGH CAPACITY GAINS</b>	<b>LOW CAPACITY RISKS</b>
<b>INDIVIDUAL</b>	<p>Knowledge of legal principles, existing legislation and jurisprudence</p> <p>Technical and legislation drafting skills</p>	<p>Policy formulation (translation and transposition of policy goals and instruments in legally binding texts; ex ante evaluation with legal criteria)</p> <p>Policy implementation (communication of policy goals, use of discretionary policy space)</p> <p>Policy evaluation (ex post evaluation of legislation with legal criteria)</p>	<p>Feasibility</p> <p>Accessibility</p> <p>Evaluability</p>	<p>Interpretation conflicts</p> <p>Time consuming procedures</p> <p>Variations in jurisprudence</p> <p>Annulment</p>
<b>ORGANIZATIONAL</b>	<p>Sufficient knowledgeable and skilled staff</p> <p>Recruitment and training incentive structures</p> <p>Legal support units</p> <p>Legal counsel</p> <p>Legal memory</p> <p>Access to legal sources</p> <p>Procedural regulatory instruments</p> <p>Inspection and enforcement structures</p> <p>Legal feedback structures</p>	<p>Policy formulation (ex ante evaluation of policy options)</p> <p>Policy implementation (co-ordination, command and control)</p> <p>Policy evaluation (ex post evaluation of legislation)</p>	<p>Reflexive regulation</p> <p>Dynamic feedback</p> <p>Efficiencies</p> <p>Support</p>	<p>Capture by highly capable external actors</p> <p>Policy obstruction by third parties</p> <p>Co-ordination conflicts</p> <p>Time delays</p> <p>Implementation deficits of all kinds</p>
<b>SYSTEMIC</b>	<p>Rule of law (legality, hierarchy of norms, vertical and horizontal separation of power, protection and assertion of fundamental rights)</p> <p>Coherence (horizontal and vertical)</p> <p>Legal feedback from society through freedom of information and accountability mechanisms</p>	<p>Policy formulation</p> <p>Policy implementation</p> <p>Policy evaluation and feedback</p> <p>Policy learning</p>	<p>Efficiency</p> <p>Effectiveness</p> <p>Democratic accountability</p> <p>Transparency</p>	<p>Regulatory inflation</p> <p>Caconomy</p> <p>Delays in administering justice</p> <p>Conflicts over vertical delegation of competences</p> <p>Conflicts over horizontal delegation of competences (balance public and private sector)</p> <p>Policy inertia</p> <p>Corruption and abuses of power</p>

Table 5 Dimensions and levels of policy capacity, adapted from Howlett, M. (2018: 52)

Resource level/ Skills dimension	<i>INDIVIDUAL CAPABILITIES</i>	<i>ORGANIZATIONAL CAPABILITIES</i>	<i>SYSTEMIC CAPABILITIES</i>
<b>ANALYTICAL COMPETENCES</b>	<u>Policy analytical capacity</u> Knowledge of policy substance and analytical techniques and communication skills and the individual level	<u>Organizational analytical capacity</u> Storing and disseminating information on client need; service utilization; budgeting, Human resource management, E-services	<u>Knowledge System Capacity</u> Presence of high-quality educational and training institutions and opportunities for knowledge generation, mobilization and use
<b>MANAGERIAL COMPETENCES</b>	Managerial expertise capacity Strategic management, leadership, communication, negotiation and conflict resolution, financial management and budgeting	<u>Administrative resource capacity</u> Funding, staffing, levels of intra- and inter-agency communication, consultation and co-ordination	<u>Accountability and responsibility System Capacity</u> <u>Presence of rule of law and transparent adjudicative and career systems</u>
<b>POLITICAL COMPETENCES</b>	<u>Political Acumen Capacity</u> Understanding of needs and positions of different stakeholders; judgement of political feasibility; communication skills	<u>Organizational Political Capacity</u> Effective civil service bargain Politicians' support for the agency programmes and projects Levels of interorganizational trust and communication	<u>Political-Economic Capacity</u> <u>Presence of public legitimacy and trust; adequate fiscal system to fund programmes and projects; access to information</u>
<b>LEGAL CAPACITY<sup>4</sup></b>	<u>Legal intelligence capacity</u> Knowledge of legal principles, existing legislation and jurisprudence Technical and legislation drafting skills	<u>Legal resource capacity</u> Sufficient legally knowledgeable and skilled staff Recruitment and training incentive structures Legal support units Legal counsel Legal memory Access to legal sources Procedural regulatory instruments Inspection and enforcement structures <u>Legal feedback structures</u>	<u>Legal system capacity</u> <u>Rule of law</u> Coherence vertically and horizontally Legal feedback from society through <u>freedom of information</u> and accountability mechanisms

<sup>4</sup> We use legal capacity here to denote the legal resources dimension instead of legal competences, to avoid confusion with the conventionally specific and narrow meaning of legal 'competence' as the legal competence to act or not to act.

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